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Supreme Court of the United States

OCTOBER TERM, 1949.

FRANK CARDENAS,
Petitioner,

VERSUS

WILSON & Co., INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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May, 1950.

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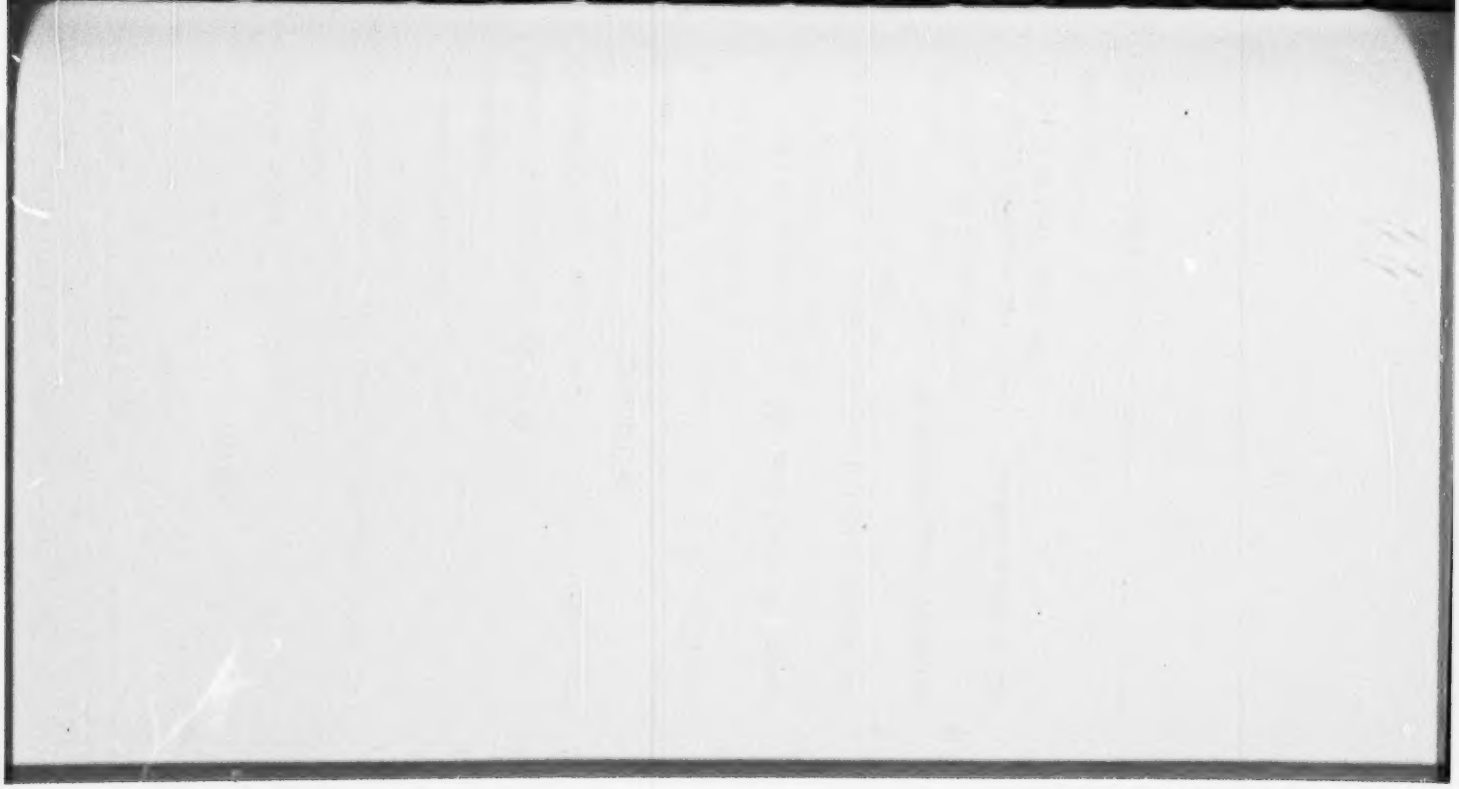

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The petitioner, Frank Cardenas, prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered on February 17, 1950.

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is at pages 21 to 25 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

(a) Whether the order of the National Labor Relations Board which directed respondent to cease and desist from recognizing the Employees' Representative Committee as bargaining agent for petitioner and other employees, and from giving effect to a continuing contract between respondent and the Employees' Representative Committee, had the effect of terminating the contract, to deprive petitioner, with thirty-one years service with respondent, of his seniority rights, and the right to be discharged only for proper cause, which were guaranteed by the contract.

(b) If the contract was terminated by the order of the National Labor Relations Board, is there an implied agreement between petitioner and respondent for the protection of petitioner's seniority rights and right to be discharged only for proper cause?

STATEMENT

Petitioner commenced working for respondent at its Oklahoma City plant as a laborer in 1917, and was continuously employed until October 15, 1948, when he was injured in the course of his employment, which injury disabled him until December 2, 1948, at which time he was ready, willing and able to resume his duties, and presented himself for work but employment was refused him by respondent.

In 1935 respondent and its employees, including petitioner, adopted an employees' representative plan to enable the employees to bargain collectively with respondent. In June of 1943 a plant labor agreement was entered into

between the Employees' Representative Committee, representing petitioner and other employees, and the respondent. The agreement was written, and was to continue in effect until June 1, 1944, and from year to year thereafter, subject to re-opening by either party on written notice mailed at least thirty days prior to June 1, of any year.

The contract provided that an employee could only be discharged for proper cause, and seniority based upon length of service was to be observed in laying off and re-hiring of employees. Absence due to sickness or injury did not break seniority rights.

Petitioner alleged in his complaint (R. 2-6) that by reason of his seniority rights based upon thirty-one years of service, under this contract, he was assured employment with respondent until he reached retirement age, and respondent's refusal to permit him to work constituted a breach of the agreement, and he seeks to recover the amount he would have earned from the date of refusal of employment until retirement age.

Respondent's motion to dismiss (R. 8-12) upon the ground that the agreement was vacated and annulled by an order of the National Labor Relations Board on August 30, 1945, and by decree of the Court of Appeals, Tenth Circuit, dated August 17, 1946 [156 Fed. (2d) 577], which affirmed the order of the Board on review, was sustained by the trial court and the action dismissed (R. 14-17).

The court below on appeal affirmed the judgment of dismissal (R. 21-24).

REASONS FOR GRANTING THE WRIT

This case presents the important question of the power of the National Labor Relations Board to cut off rights of employees under a collective bargaining agreement by a cease and desist order issued against the employer, which question has not, but should be decided by this Court.

This Court has said that the proceedings authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights, *Amalgamated Utility Workers etc.* v. *Consolidated Edison Co.*, 309 U. S. 261.

The order of the National Labor Relations Board does not foreclose employees from taking any action to secure adjudication upon individual contracts, nor prejudge their rights in the event of such adjudication. The order is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal. The nature and extent of such rights was not decided. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365.

Implied individual agreements may be held to govern, when men continue to work after a collective agreement has expired and conditions for collective bargaining do not exist. An employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 336, 337.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 235, the Court expressed doubt as to the authority of the National Labor Relations Board to invalidate contracts with independent labor organizations, and said that the power of the Board to command affirmative action is remedial and not punitive.

In the case at bar, before the order of the National Labor Relations Board was made, the petitioner clearly had a right of action for a breach of the collective agreement, *System Federation No. 59 etc.* v. *Louisiana and A. Ry. Co.*, 119 Fed. (2d) 509, and he contends that there is no valid distinction between his rights under the collective agreement and the rights of an employee under an individual contract covering the same subject matter, and that the order of the Board did not terminate the collective agreement so as to cut off his seniority rights and his right to be discharged only for proper cause, as those provisions of the contract do not thwart the policy of the National Labor Relations Act.

In other words, petitioner's position is that the National Labor Relations Board only had power to prevent respondent from violating the National Labor Relations Act and from thwarting the policies of the Act. It had no power to take away any benefits to petitioner gained by collective bargaining with respondent, even though the respondent was adjudged guilty of unfair labor practice in making the agreement, and petitioner has the right to enforce the agreement to protect those benefits so long as the enforcement thereof does not enable respondent to circumvent the Act.

Any other construction of the Act or the Board's order would be inimical to the purpose of the Act. It would, as aptly illustrated by the facts in this case, enable the respondent to use the order of the Board, issued because of its unfair labor practice, to relieve itself of its obligations to petitioner under the continuing contract.

If the contract was terminated by the Board's order, it seems clear under the statement by the Court in *J. I. Case Co.* v. *National Labor Relations Board, supra,* when petitioner continued to work after the Board had made its order, an individual contract between petitioner and respondent is implied, which embraces all of the terms of the collective agreement not offensive to the policy of the National Labor Relations Act.

The court below stated that the order of the National Labor Relations Board terminated the collective agreement, and was of the opinion that the rights of the petitioner under the agreement were terminated by the order.

We believe the decision of the court below is in conflict with the reasoning of this Court in *National Licorice Co.* v. *National Labor Relations Board, supra,* and that this Court should decide the effect of an order of the National Labor Relations Board directed to an employer, ordering it to cease and desist from giving effect to a collective agreement, upon the rights of the employees under said contract.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

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May, 1950.